IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1404 of 1983

with

FIRST APPEAL No 1405 of 1983 & 1269 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

G S R T C

Versus

MANUBHAI P PATEL

Appearance:

1. First Appeal No. 1404 of 1983
MR MD PANDYA for Petitioner
MR DF AMIN for Respondent No. 1
NOTICE SERVED for Respondent No. 3
MR SB VAKIL for Respondent No. 6

2. First AppealNo 1405 of 1983
MR MD PANDYA for Petitioner
MR DF AMIN for Respondent No. 1

NOTICE SERVED for Respondent No. 2
MR SB VAKIL for Respondent No. 6

CORAM : MR.JUSTICE H.R.SHELAT
and
MR.JUSTICE H.H.MEHTA

Date of decision: 25/04/2000

ORAL JUDGEMENT

(Per H.R. Shelat, J.)

1 These 3 appeals are directed against the judgement and award dated 20.08.1982 passed by the then learned Chairman of the MAC Tribuna (Aux.) at Godhra in MAC Petitions Nos.493 of 1981 and 612 of 1981 on his file awarding the compensation arising out of motor accident.

2 Necessary facts may, in brief, be stated. Hemant Manubhai Patel aged about 24 years was the partner in C.M. Patel & Co. He was also earning by rendering the services as a Supervisor in Das Patel & Co. Niranjan Nagindas Shah was the friend of Hemantbhai. He was serving in Krupalu Lime Industries and was earning Rs.4,000/- per month. He was also the partner in a firm called Krupalu Pulse Mills wherein he was having 35 paise share. On 10.5.1981 both Hemantbhai and Niranjanbhai were going to Vadodara from Chhotaudepur in connection with the work of Tusharbhai. They were going to Baroda riding over the scooter. Niranjanbhai was driving the scooter, while Hemantbhai was the pillion-rider. The scooter was driven at the moderate speed and that too on the left side of the road. When they reached near Halol S.T. Bus Stand, one S.T. bus from Jambusar to Jambughoda, driven by Babubhai Ahmedbhai Shaikh, respondent no.1, was approaching from the opposite direction. The bus was driven at the excessive speed, with the result the S.T. bus driver hit the scooter and knocked down Hemantbhai and Niranjanbhai seriously injured. Niranjanbhai fell on the right side, but unfortunately, Hemantbhai fell on the right side of the S.T. bus driver with the result the right back wheel of the ST bus ran over the head of Hemantbhai, dragging him upto a distance of about 20 ft. Hemantbhai succumbed to the injuries at the spot. Niranjanbhai was taken to SSG Hospital at Baroda for treatment where he was hospitalised for about 16 days and thereafter he took treatment at home as outdoor patient. To get the compensation under the Motor Vehicles Act, the father and mother of deceased Hemantbhai field MAC Petition No.493

of 1981 in the MAC Tribunal (Aux.) at Godhra for compensation of Rs.2,50,000/- while Niranjanbhai filed MAC Petition No.612 of 1981 in the said Tribunal for compensation of Rs.50,000/-. The then learned Chairman of the Tribunal appreciating the evidence before him partly allowed MAC Petition No.493 of 1981 filed by the parents of deceased - Hemantbhai and awarded Rs.69,320/together with running interest at the rate of 6% per annum from the date of the petition till realisation and the costs in proportionate. He fully allowed MAC Petition No.612 of 1981 and passed the award for Rs.50,000/- together with running interest at the rate of 6% per annum from the date of the petition till realisation and costs in proportionate. Being aggrieved by such judgement and awards, the appellant original opponent no.2 has filed two appeals, namely, First Appeal No.1401 of 1983 and 1405 of 1983 challenging the legality and validity of the awards both on the points of negligence and quantum, while the parents of deceased Hemantbhai (original petitioners in MAC Petition No.493 of 1981) have filed First Appeal No.1269 of 1983 for the claim disallowed by the Tribunal.

4 The learned advocate representing Gujarat State Road Transport Corporation contends, while assailing the judgement and award, that the Tribunal ought to have fully attributed negligence to Niranjanbhai who was driving the scooter. The incident happened not because ST bus driver was solely negligent in driving the bus. Niranjanbhai who was riding over the scooter was not at all careful in driving. He was driving his scooter on his wrong side. How the incident happened is also then brought to our notice by the learned advocate poining out the panchnama, written statement, evidence of the ST bus driver and also the evidence of Niranjanbhai Exh.72. As submitted, when the bus was going towards Halol Bus stand one donkey was crossing the road from the right side of the ST bus driver to the left side. At that time Niranjanbhai was coming from the opposite direction driving the scooter, and at one point of time the donkey, scooter and ST bus came in one line. The scooter was in between the donkey and ST bus. As the donkey was very close, to pass conveniently, Hemantbhai gave a kick to the donkey, with the result, Niranjanbhai lost the balance and both Hemantbhai and Niranjanbhai fell down on the road. Hemantbhai fell towards the side of the bus. The back right wheel of the bus hence ran over the head of Hemantbhai and he succumbed to the injuries. Thus, the accident can be said to have happened because of the sole negligence on the part of the scooter driver, Niranjanbhai and not the bus driver.

5 In view of such contention, who is responsible for the accident is the point posed before us for examination. In other words, who was negligent in driving the respective vehicles is the point that arises for our consideration. In order to fasten the liability qua the negligence, the manner in which the accident happened has to be ascertained, perusing the evidence. It may be stated that the evidence is not clear to spell out the manner in which the incident happened and therefore we are left to judge on the basis of reasonable guesswork. In the FIR at Exh.37A the S.T. bus driver Babubhai A Shaikh has come out with the say that the donkey was standing on the road when he was driving the bus. Very close to the donkey the scooter was passing and when the donkey raised the head, the scooterist gave a kick and he lost the balance. The pillion rider was thrown off and he came under the rear back wheels and sustained injuries to which he succumbed. The ST bus driver, while in his evidence at exh.85 has come forward with the theory that he saw the scooter coming when he was at a distance of about 200-250 ft. He then applied the brake and gained control over the bus. He however was proceeding and at that time the donkey started to cross the road from his right side to left side. He blew the horn and took the bus on his right side. At that time in between the bus and the donkey the scooterist came. The pillion rider of the scooter then gave a kick to the donkey which he could see from the rear side-seeing mirror. He then applied brakes but by the time the pillion rider who was thrown off, came under the right rear side wheel and sustained injuries. According to him had the pillion rider not kicked the donkey, the incident would not have happened.

6 Niranjanbhai Nagindas Shah Exh.72 who was driving the scooter has come out with a contrary version. According to him, he was driving the scooter at the moderate speed remaining on the left side of the road and when he reached near the place of incident, the bus which was approaching from the opposite direction was being driven at the excessive speed, and also without taking care of the heavy traffic on the road. The bus then hit the place between the accelerator and break of the scooter as a result he was blown off on his left side while deceased Hemantbhai fell on his right side and came under the rear right wheel of the bus. He denied about the fact that the donkey came on the road and the scooter was in between the donkey and the bus. He has also denied the fact that Hemantbhai tried to give a kick to

the donkey and lost the balance as a result both fell on the road.

7 Thus, both the drivers find fault with the other one saying that he was not negligent but the other side was. Nothing can with certainty be said as to who was negligent or whether both were partly negligent. No doubt, police has drawn the panchnama exh.36A during the course of the investigation after the complaint was lodged by the S.T. Bus driver, but the panchnama also is not of much help as it shows the position of the vehicles that was found after the incident. What transpires from the panchnama is that the road in question is north to south in length, towards north it leads to Halol, while towards South to Baroda. The bus was going to Halol and therefore its correct side was western half of the road and the scooter was coming from Halol Bus stand side and therefore its correct side was eastern half of the road. The total width of the road is 20 ft. On both the sides of the road there are shoulders each having a width of 5 ft. In the middle of the road flesh and blood were found. Towards west 11 ft. road was open while towards east 9 ft. road was open. The scooter was found lying leaving a distance of 2 ft. from the eastern border of the road towards west. From the scooter at a distance of 20 ft. on the northern western side one S.T. bus was found lying in transverse position. The wheel marks were also seen. From such facts noted by the police, one can say that two vehicles had collided but not the manner in which the incident happened so as to fasten the liability qua the negligence. For that the only decisive factor or sign we find is the photograph produced on record at exh.87. The photographs show that the scooter is lying by the side and the same seems to be at a distance noted in the panchnama i.e. 2 ft from the eastern border of the road. It may be stated at this stage at the cost of repitition that the eastern half of the road was the correct side of the scooterist. The scooter was therefore found on the correct side. The wheel marks and the brake marks are seen right from the place where the scooter is found up to the right back wheel of the bus which is seen on the northern western direction from the scooter and those brake marks or wheel marks are in curved form commencing from virtually the middle of the eastern half of the road to the rear right back wheel of the bus which is on the western half of the road and around 2 to 3 ft. away from the middle line, namely, divider. This shows that the bus before it hit the scooter had gone to its wrong side upto a distance of about 7 to 8 ft. and then hitting the scooter, taking a left turn it went on to its left side and came to a halt

but the right hand backside portion of the bus is found covering at least 2 or 3 ft. portion of the eastern half of the road.

8 Why the bus was taken on the wrong side is not explained by the bus driver. Ordinarily, one has to drive the vehicle remaining on one's own left side. If it is necessary and safe, one may drive on the wrong side, but the driver in case any mishap happens, has to explain what was the compelling reason for him to drive on the wrong side. If he does not or comes with a false explanation, he cannot escape of his liability that arises from the accident. In the case on hand the bus driver has not offered any explanation in his W.S. as to why he went on his wrong side. He has conveniently remained silent but at the time of hearing he has come out with a case of donkey being there on the road in a stationary position and then moving from his right side to his left side. His such explanation is not appealing. The duty of the driver is to drive in a manner which would be safe not only to him but to all others who are using the road or passing by the road. He was passing through a thickly populated area of town Halol. From the opposite direction, the scooter was coming and he had seen the donkey on the road and that too on his right side. It was therefore not at all advisable for him to drive on the wrong side of the road because in that case there was possibility of collision. However, he preferred to drive on the wrong side, as a result, the incident happened. He can therefore be held solely responsible for being negligent in driving the bus because he committed the breach of his duty not to drive on the wrong side, which was also endangering the safety.

9 There is also another possibility which on the reasonable guess-work one can visualise. If at all his theory of donkey is believed, the donkey may be on his left side and to save the donkey he must have gone to his wrong side, but he ignored the oncoming traffic and took a risk, as a result, the incident happened. The other possibility is that there may not be a donkey but there may be some obstruction on his left side and to avoid collision with that object, or thing he must have taken the bus on his wrong side so as to proceed ahead but his judgement did not come true and the incident happened. If at all there was any obstruction or donkey on his left hand side and when the scooter was coming from the opposite direction the duty of the bus driver was to apply brakes and slow down the bus, and if found necessary to stop the bus and proceed further after the passage was cleared. But here the impassionate bus

driver did not do so and continued to drive the bus at the same speed taking the bus on his wrong side, as a result the incident has happened. In any case, the bus driver committed the breach of his duties which is the cause of the accident. He is therefore solely responsible for the incident.

10 Niranjanbhai Nagindas Shah who was driving the scooter has, as per the photograph not crossed his correct side. He continued to be on his left side and that too very close to the eastern border because he was about 2 ft away from that border. He must have seen the bus coming from the opposite direction, but it was not possible for him to move more and more on his left side because he was virtually on the border of the road as he remained about 2 ft away from the border. He, therefore, cannot be blamed even to a little extent for the incident. As canvassed, Niranjanbhai cannot be held guilty of negligent driving.

11 Having found that the incident happened because of the sole negligence on the part of the bus driver, we will now switch over to the question of quantum of compensation awarded. The S.T. Corporation has challenged the compensation submitting that it is fixed on an alarmingly higher side in both the cases. Firstly, we will deal with the case alleged in First Appeal No.1404 of 1983. The father and mother of deceased Hemantbhai filed MAC Petition No.493 of 1981 claiming the compensation of Rs.2,50,000/= against which the Tribunal has awarded Rs.69,320/=. When the family members lose the bread earning member in the motor accident the compensation has to be assessed considering the help extended by the deceased to the family and the period for which he would have contributed to the family for maintenance. In order to determine the point, one has to know what the income of the deceased was and what he was contributing. Both the parties have with regards to the income of Hemantbhai come forward with the say suitable to their respective cases, but we would like to place the reliance on the income-tax assessment order which is the best proof rather than entangling ourselves in the evidence which cannot be said to be efficacious and reflecting inspiring confidence. The copies of the Assessment Orders are produced at Exh.43 and 44. The Assessment Order Exh.43 reelates to the Assessment Year 1980-81 and the Assessment Order at Exh.44 relates to the Assessment Year 1981-82. During the Assessment Year 1980-81 the deceased was having in all the income of Rs.11,590.17 ps. inclusive of Rs.4,800/=, the salary which he was getting from M/s T.M. Patel & Co., over and

above his share in the firm. While the Assessment Order at Exh.44 shows the income for the Assessment Year 1981-82 was Rs.9,467/= inclusive of the salary he was getting. These two Assessment Orders show that the income of the deceased was not consistent but remained fluctuating, may be because of the profit of the firm remained fluctuating while carrying on the business. When the income is fluctuating, the average income has to be assessed. On the basis of these two years, the average income per year can be assessed at Rs.10,493/=. Over and above, such income deceased Hemantbhai was also earning Rs.800/- per month form Das Patel & Co. i.e. Rs.9,600/- per year. If that is added to the average income, his total income per annum comes to Rs.20,093/-.

12. It is at this stage the submission of Mr Amin, the learned advocate representing the appellant in First Appeal No.1269 of 1983, that the Tribunal ought to have added prospective income of the deceased because by passage of time he would have earned more and more and he would have also contributed to the family more and more. It is not possible to accept the contention. No doubt, future income has to be considered, but in those cases where the future income is certain or can be ascertained with certainty. If the income is fluctuating, or the future income is not certain, or future income if depends upon the speculation, the same has to be kept out of consideration. The deceased was carrying on business in parternship and was earning, but as stated above, his income was not steady and certain. The assessment orders at Exh.43 and 44 show that the income remained fluctuating. When the future income is not certain in business because of ups and downs, the prospective value cannot be assessed and added to the above income we have found.

13. It is also the contention of the learned advocate representing the S.T. Corporation that earning capacity of the deceased has to be assessed and not the income he was actually receiving from the firm. The deceased was aged 24 years. He was one of the partners of the firm. The business of the firm was depending upon several factors, namely, goodwill, capital, place of business, skill of the partners, investment, situation, availability of market participation, supervision, decision taking capacity, etc. for which reliance is also placed on a decision of this Court rendered in the case of AMINAKHATUN V. FAKRUSHA 23(1) GLR 728. In the case on hand whatever profit the firm was making out of the business was not the result of the exertion or skill of the deceased, but of other partners and therefore the

earning capacity of the deceased may be valued far below the income which is found to have fallen to his share.

14. A partnership is a contract of two or more competent persons to place their money, effects, labour, and skill, or some or all of them, in lawful commerce or business, and to share the profit and bear the loss in certain proportion. Every partner is therefore having a general duty to attend diligently to the firm's business. By collective efforts or contribution the firm functions and earns profit. Individual profit or personal gain is beyond contemplation. For his share every partner in the joint venture can be said to have contributed one way or the other by money or skill or labour or guts, or intelligence, adroitness or expertise, or knack, proficiency or ingenuity and the like. The share the partner is getting is the result of collective efforts or contribution and not of one or two partners alone. The share in the profit the partner is getting should therefore be treated to be his earning capacity. Even otherwise also for assessing notional income wherever the same is necessary for awarding just compensation the amounts that would have fallen to his share being a partner should generally be considered to be the base. Apart from such aspect, ordinarily, actual income, the victim of motor accident was getting should be considered to be his earning capacity, regardless of his qualifications, ability, or capacity, or skill, to earn, and not the fact that one or two partners in the firm and not the victim were the backbone qua management and administration of the firm. In any case, therefore the share the victim of the motor accident in partnership firm is getting should be treated as his earning capacity and cannot be reduced as canvased.

15. What must be the contribution to the father and mother claiming the compensation is the next point that arises for consideration. Hemantbahi was aged 24 years. He was unmarried. After few years he would have married and become a family man by passage of time. Hence, he would have certainly reduced the amounts which he was paying to his father and mother, and diverted major portion of his income towards his wife and children. Hence, the contrubtion to the father and mother which one may find higher at the initial stage would not remain the same or would not be increasing, but would show a descending trend and therefore average income has to be worked out which would ordinarily be, subject to other governing factors if any one-third of the total income. One third of the aforesaid income of the deceased comes to Rs.6693/= but rounding off to the nearer hundred it

can be taken to be at Rs.6700/= per year.

16 The help that is found to the family has to be multiplied adopting a suitable multiplier. The multiplier has to be adopted considering the remaining period of help but certainly not exceeding 18 in any case as the Parliament thought it fit to adopt multiplier to the maximum of 18 as pointed out in the structured formula given vide Schedule-II pursuant to the introduction of Section 163A in the Motor Vehicles Act, 1988. The father of the deceased was aged 46 years while the mother was aged 40 years on the day of the accident. Ordinarily, the span of life can be considered to be of 70 years. Had Hemantbhai survived, he would have helped his father or mother or at least his mother for 30 years. In this case, therefore, looking to the period of help, the proper multiplier which can be adopted should be of 15. If the yearly contribution is multiplied by 15, the amounts which can be awarded under the head of loss of dependency would come to Rs.1,00,500/=.

17. Over and above such amount, the father and mother of Hemantbhai are entitled to Rs.5000/= the then prevailing conventional amount under the head "loss to the estate of the deceased." The father and mother are therefore entitled to the same. On no other head they are entitled to more amount by way of compensation. In all thus they are entitled to Rs.1,05,500/=. The Tribunal has in our view for the aforesaid reasons awarded less amount than what can reasonably be awarded. The claimants in First Appeal No.1269 of 1983 are therefore entitled to Rs.38,180/= more than what has been awarded to them and of course together with interest and cost in proportion from the S.T. Corporation and the driver of the bus.

18. We shall now deal with the rival contentions advanced in FA No.1405 of 1983. So far as negligence is concerned, we have already dealt with and it is therefore not necessary to repeat the same. With regard to the quantum, we may say that though under different heads assessment is on higher side, the appellant does not succeed. Niranjanbhai sustained the following injuries mentioned by the Doctor in the Certificate at Exh.41:-

(1) Unable to bend left elbow joint beyond 120o normal 135o.

(2) Unable to supinate left fore arm 60o is present 120o normal

(3) Limitation of Dorsi flexion by 15 o, 45o

normal

(4) Ulnar deviation is 0o instead of 35o

(5) Radial deviation was normal.

(6) X-ray shows fracture of ulna united. Fracture of radius not united. Nail in position.

Niranjanbhai was hospitalised for about 16 days and thereafter he had to take rest at home because of the fracture of ulna and radius bones. He was also operated. At present his ulna bone is united but not the same case qua radius bone with the result, some disability has remained. The doctor has assessed the disability at 20%. Considering the above said injuries, Niranjanbhai during the period of treatment both indoor and outdoor, must be worrying about his future and must be passing through excruciating pain. He is therefore looking to the period of treatment and the nature of the injuries causing pain is entitled to Rs.10,000/= under the head "pain, shock and suffering". The Tribunal has awarded Rs.22,500/= which is certainly on a higher side.

19 As there is 20% disability, Niranjanbhai is entitled to reasonable amount. Under the head permanent partial disability Rs.44,000/= have been awarded by the Tribunal but the same are also on the higher side. For the purpose of assessing the amount under permanent partial-disability-head, the income of the victim is the guiding factor. As per his evidence, he was earning Rs.4,800/= by way of salary per year from M/s Krupalu Lime Industries. He was the partner in the partnership firm called Krupalu Pulse Mills where in he was having 35 paise share. Regarding the income the copy of the income-tax assessment order is produced at Exh.77 which outvies oral evidence regarding the income led. As per that assessment order during the year 1981-82 35% share came to Rs.16,065/=. Over and above such income, his salaried income as stated above was Rs.4,800/=. If the same is added to his 35% share in the firms, the total income per annum comes Rs.20,865/=. By rounding off to the nearest hundred, the same can be taken to be Rs.20,800/=.

20 It is the contention that considering the prospective income his yearly income may be considered Rs.22,000/=. For the reasons stated above, in this case also the prospective income being fluctuating cannot be considered for the purpose of assessing the amount under

the head yearly income. Rs.20,800/= must therefore be made the base.

21 As per the evidence of Doctor (Exh.38) the disability assessed is at 20%. The disability is not the functional one. According to the doctor, Niranjanbhai would be able to drive the vehicle, lift heavy objects and play all types of games. He would be able to attend his business and render his services in the same way he was prior to the incident. When there is no functional disability, the same has to be considered half considering the whole body. The disability in this case should therefore be treated to be 10% which is also treated to be so by the Tribunal. Considering the yearly income, the yearly disability of 10% would come to Rs.2,080/=. Niranjanbhai on the date of the accident was aged about 24 years. He would have remained active in carrying on his business in the partnership firm at least up to the age of 65 years. When he is in a position to carry on the business for about 40 years more, the yearly disability has to be multiplied by 15 adopting 15 multiplier. If that is done, Niranjanbhai is entitled to Rs.31,200/= under the head "permanent partial disability" and not Rs.44,000/= awarded by the Tribunal.

22. Under the head nursing and care Rs.160/= are awarded while under the head medical treatment charges and conveyance charges Rs.500/= are awarded about which no one has any grievance.

23. For six months Niranjanbhai could not attend his work, with the result he sustained the loss of income of that period. Considering his yearly income, the six months loss comes to Rs.10,400/=. The Tribunal has awarded the same under the head "loss of income" about which also no dispute is raised. On no other grounds the contentions are advanced.

24. In view of the above discussion, the compensation which can be awarded comes to Rs.52,660/= and not Rs.77,560/=, as assessed by the Tribunal. However, the appellant cannot succeed because Niranjanbhai has prayed for Rs.50,000/= only, while he is found to be entitled to Rs.52,660/=. He is therefore entitled to the award in full which the Tribunal has already passed. First Appeals Nos.1404 & 1405 of 1983 are therefore devoid of any merits and the same are liable to be dismissed.

25. In view of what we have said hereinbefore, the appeals being First Appeals Nos.1404 of 1983 and 1405 of 1983 are liable to be dismissed, while First Appeal

No.1269 of 1983 is required to be partly allowed. In the result, First Appeals Nos.1404 of 1983 and 1405 of 1983 are hereby dismissed. First Appeal No.1269 of 1983 is hereby partly allowed. The award is modified. The respondents nos.1 and 2 are hereby ordered to pay Rs.38,180/= jointly and severally to the appellants in First Appeal No.1269 of 1983 over and above the amounts awarded by the Tribunal together with interest thereon at the rate of 6% per annum from the date of the petition till realisation and shall also pay the costs in proportionate.

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